Palaniappan v Universiti Pertanian Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4-22-137-1992
VISU SINNADURAI J
17 JANUARY 1995

Civil Procedure *— Amendment — Effect of amendment — Whether addition of new cause of action which is statute-barred — Whether leave should be given — Wide discretion of courts — Factors to be considered — Proper test to be applied — Rules of the High Court 1980 O 20 r 5(5)*

Civil Procedure *— Limitation — Amendment of pleadings — Addition of new cause of action — Whether court can grant leave even where new relief or remedy is sought — Rules of the High Court 1980 O 20 r 5(5)*

The plaintiff was employed by the defendant, Universiti Pertanian Malaysia, in January 1963. On 9 January 1986, pursuant to a domestic inquiry, the plaintiff was dismissed by the defendant. The plaintiff commenced an action against the defendant praying, inter alia, for a declaration that the dismissal was without just cause or excuse. The defendant filed their defence and subsequently the plaintiff sought to amend his writ of summons and statement of claim. The defendant objected. After a series of applications to amend and withdrawals thereof, the plaintiff finally made a fourth application to amend on 27 May 1994, seeking to add the averment that his dismissal was wrongful and to include a prayer for general and special damages for wrongful dismissal and/or reinstatement. The defendant again objected to the proposed amendment on the ground that effect of the amendment was to add a new cause of action which was statute-barred. Having regard to the defendant's objection, the court thus had to decide whether leave should be granted to the plaintiff to amend so as to introduce the alleged new cause of action after limitation had set in.

Held, allowing the plaintiff's application:

(1) The courts have a wide discretion whether or not to allow an amendment. The proper test to apply is not whether the amendment would cause injustice to the other party, but whether in the circumstances of the case, it was just to grant leave. In exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment. Generally, the courts readily grant leave to amend before trial, so long as the application is made in good faith and within a reasonable time and so long as the injustice caused to the opponent can be compensated by costs.

(2) In the present case, leave was granted to the plaintiff to make the proposed amendments, as it did not amount to a new cause of action which was statute-barred. The amendments caused no

injustice to the defendant and the application appeared to have been made in good faith. A

(3) Order 20 r 5(5) of the Rules of the High Court 1980 ('the RHC') gives the court the discretion to allow an amendment which introduces a new cause of action after the expiry of the relevant limitation period, provided the new cause of action arises from the same facts or substantially the same facts. Under this rule, the court also has the power to grant leave where the plaintiff seeks to add a new relief or remedy. B

(4) In this case, even if the plaintiff were introducing a new cause of action, the new facts were substantially the same as those originally pleaded by the plaintiff. It could not be said that the defendant was taken by surprise as it was aware of the plaintiff's action right from the start. C

(5) If the amendments were not allowed, the plaintiff would be deprived of any redress. Greater injustice would be caused to the plaintiff in not allowing the amendments than to the defendant in allowing the amendments. Leave was therefore granted to the plaintiff to amend his pleadings and the defendant was given time to file his amended defence, if necessary. D

[Bahasa Malaysia summary E

Plaintif telah digaji oleh defendan, Universiti Pertanian Malaysia, pada Januari 1963. Pada 9 Januari 1986, berikutan daripada satu siasatan domestik, plaintif telah dipecat oleh defendan. Plaintif telah memulakan tindakan terhadap defendan dan memohon, antara lainnya, satu deklarasi bahawa pemecatan itu adalah tanpa alasan atau sebab yang adil. Defendan telah memfailkan pembelaan mereka dan kemudiannya plaintif telah cuba meminda writ saman dan pernyataan tuntutannya. Defendan telah membantah. Selepas satu siri permohonan untuk membuat pindaan dan penarikan balik permohonan itu, plaintif akhirnya membuat satu permohonan yang keempat untuk membuat pindaan pada 27 Mei 1994 supaya menambahkan penegasan bahawa pemecatannya itu adalah salah dan untuk menyertakan permohonan untuk gantirugi am dan khas bagi pemecatan salah dan/atau pengembalian semula. Defendan sekali lagi membantah terhadap pindaan yang dicadangkan itu atas alasan bahawa kesan pindaan itu adalah untuk menambahkan suatu kausa tindakan yang baru yang dilarang oleh had masa. Memandangkan bantahan defendan, mahkamah oleh itu terpaksa memutuskan sama ada kebenaran patut diberikan kepada plaintif untuk membuat pindaan untuk mengemukakan kausa tindakan baru yang didakwa itu selepas had masa yang ditetapkan telah tamat. F G H I

Diputuskan, meluluskan permohonan plaintif itu:

(1) Mahkamah mempunyai budi bicara yang luas sama ada atau tidak membenarkan suatu pindaan. Ujian yang betul yang

seharusnya digunakan bukanlah sama ada pindaan itu akan mengakibatkan ketidakadilan kepada pihak yang satu lagi, tetapi sama ada dalam keadaan kes, adalah adil untuk memberikan kebenaran. Dalam menggunakan budi bicara itu, mahkamah mesti mengimbangkan kemudaratan yang akan dialami oleh kedua-dua pihak jika pindaan itu dibenarkan atau tidak. Secara amnya, mahkamah sedia memberi kebenaran untuk meminda sebelum perbicaraan, asalkan permohonan itu dibuat dengan ikhlas dan dalam tempoh yang munasabah dan asalkan ketidakadilan yang dikenakan ke atas pihak lawan boleh dipampaskan dengan kos.

(2) Di dalam kes ini, kebenaran diberikan kepada plaintif untuk membuat pindaan yang dicadangkan itu kerana ianya bukan kausa tindakan yang baru yang dihalang oleh had masa. Pindaan tersebut tidak mengakibatkan ketidakadilan kepada defendan dan permohonan itu nampaknya telah dibuat dengan ikhlas.

(3) Aturan 20 k 5(5) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memberikan budi bicara kepada mahkamah untuk membenarkan satu pindaan yang mengemukakan satu kausa tindakan yang baru selepas habisnya tempoh had masa yang relevan, asalkan kausa tindakan yang baru itu berbangkit daripada fakta-fakta yang sama atau sebahagian besarnya adalah fakta yang sama. Di bawah aturan ini, mahkamah juga mempunyai kuasa untuk memberikan kebenaran di mana plaintif memohon untuk menambahkan relief atau remedi yang baru.

(4) Di dalam kes ini, meskipun plaintif mengemukakan satu kausa tindakan yang baru, fakta-fakta yang baru itu adalah sebahagian besarnya sama dengan fakta-fakta asal yang telah dijadikan pli oleh plaintif. Tidaklah boleh dikatakan bahawa defendan telah diserang secara mengejut kerana ia memang sedar akan tindakan plaintif dari mula lagi.

(5) Jika pindaan itu tidak dibenarkan, plaintif akan kehilangan peluang mendapat tebus rugi. Ketidakadilan yang lebih teruk akan diakibatkan kepada plaintif jika pindaan itu tidak dibenarkan daripada ketidakadilan yang akan diakibatkan ke atas defendan jika pindaan itu dibenarkan. Oleh itu, kebenaran diberikan kepada plaintif untuk meminda plidingnya dan defendan diberikan masa untuk memfailkan pembelaannya yang dipinda, jika perlu.]

Notes

For cases on amendment of pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 205–243.

Cases referred to

Casper Trader, The [1991] 2 Lloyd's Rep 237 (folld)

Central Electricity Board v Halifax Corp [1963] AC 785; [1962] 3 All ER 915 (refd)

Chan Mui Eng & Ors v Chua Chu Huwe & Anor [1994] 1 SLR 375 (refd)
Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd [1986] 2 MLJ 41 (refd)
Coburn v Colledge [1897] 1 QB 702 (refd)
Cropper v Smith (1884) 26 Ch D 700 (refd)
Dorman v JW Ellis & Co Ltd [1962] 1 All ER 303 (refd)
Fadzil bin Mohamed Noor v University Technology Malaysia [1981] 2 MLJ 196 (refd)
Francis v Municipal Councillors of Kuala Lumpur [1962] MLJ 407 (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 232 (folld)
Ismail bin Ibrahim v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348 (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1990] 2 MLJ 65 (refd)
Letang v Cooper [1965] 1 QB 232 (refd)
Lim Yong Swan v Lim Jee Tee [1993] 1 SLR 500 (folld)
Mahan Singh v Government of Malaysia [1973] 2 MLJ 149 (refd)
Multi-Pak Singapore Pte Ltd v Intraco Ltd [1992] 2 SLR 793; [1993] 2 SLR 113 (CA) (refd)
Pushpadevi Singam v University of Malaya [1993] 2 AMR 3025 (refd)
Rodriguez v RJ Parker (Male) [1967] 1 QB 116 (refd)
Vine v National Dock Labour Board [1956] 1 QB 658 (refd)
Virginia Rhea, The [1983] 1 MLJ 198; [1985] 2 MLJ 1 (CA) (refd)
Welsh Development Agency v Redpath Dorman Long Ltd [1994] 4 All ER 10 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Public Authorities Protection Act 1948
Rules of the High Court 1980 O 20 r 5(1), (5)

M Mohan Ghandi (*Mohan Ghandi & Associates*) for the plaintiff.
Hj Sulaiman bin Abdullah (*Malathi Menon* with him) (*Zain & Co*) for the defendant.

Visu Sinnadurai J:

FACTS

The plaintiff was employed by the defendant, Universiti Pertanian Malaysia, as a junior technician in January 1963. On 9 January 1986, pursuant to a domestic inquiry, the plaintiff was dismissed by the defendant on the ground that he had stolen 120 eggs.

On 19 December 1987, the plaintiff through his then solicitors, Lobo & Associates, commenced an action against the defendant in the special powers and appellate division, High Court in Kuala Lumpur. In the statement of claim, the plaintiff prayed, inter alia, for:

A (i) a declaration that the dismissal was without just cause or excuse; and

(ii) all necessary and consequential remedies.

The defendant filed their statement of defence on 5 February 1988. On 3 May 1988, an order was made by the senior assistant registrar ('the SAR') requesting the plaintiff to serve on the defendant further and better B particulars.

Sometime in 1989, the plaintiff changed his solicitors, and the present solicitors, Mohan Ghandi & Associates, were appointed to represent the plaintiff.

C *First amendment (encl 40)*

After a number of hearings before the judge in chambers, on 8 March 1991, the plaintiff applied to amend the writ of summons and the statement of claim, and also to have the case transferred from the special powers and appellate division of the High Court to the civil division of the High Court D in Kuala Lumpur.

The proposed amendment was to substitute a claim for 'general damages for wrongful dismissal', instead of the earlier prayer for a declaration that the plaintiff's dismissal was without just cause (encl 40).

E Earlier, on 4 March 1991, the defendant informed the plaintiff that they would be raising a preliminary objection at the commencement of the hearing of the amendment to the pleadings (encl 38) as to the propriety of the proposed amendments.

In August 1991, the SAR, however, allowed the plaintiff's application to amend the pleadings and also to have the case transferred from the F special powers and appellate division to the civil division of the High Court in Kuala Lumpur. A new file number, bearing the civil division reference was then assigned to this file.

On 16 August 1993, the case was finally set down for trial for 22 and 23 September 1993 (encl 8).

G The plaintiff's solicitors, however, on 9 September 1993 wrote to the court requesting for a postponement of the trial on the ground that they wished to make further amendments to their pleadings (encl 10). This request for postponement was, however, refused.

H *Second amendment (encl 12)*

On 22 September 1993, that is, on the date fixed for trial, counsel for the plaintiff again requested for a postponement of the trial on the ground that as the case was now before the civil division, certain amendments to the pleadings were necessary, as these were most crucial to the plaintiff's I claim. After considering the request of the plaintiff, the court was of the view that the request by the counsel for the plaintiff was not unreasonable, and further as counsel for the defendant did not have any strong objection, granted the postponement of the case to 6 October 1993. Tuan Hj Sulaiman,

who appeared for the defendant, however, informed the court that he would still be raising the preliminary objection.

On 6 October 1993, the formal application made by the plaintiff to amend the pleadings (encl 12) was heard by this court. In this second application to amend the pleadings, the plaintiff sought to include reinstatement as an alternative remedy, 'general damages for wrongful dismissal, and/or reinstatement with all fringe benefits'.

However, in view of the defendant's objections to these amendments, and also as it appeared to the court that counsel for the plaintiff was still unclear as to the proper remedy which ought to be sought, and also as to the exact nature of the amendments to the pleadings, the court allowed counsel for the plaintiff further time to reconsider and study the entire file. The defendant's solicitors also informed the plaintiff's solicitors that as the plaintiff was seeking reinstatement in the proposed amendment, they would be raising a preliminary objection to the amendment on the ground of limitation.

The plaintiff's counsel subsequently withdrew his application for the amendments of the pleadings as contained in encl 12.

Third amendment (encl 17)

The plaintiff's counsel then filed another application to amend the pleadings to seek the following reliefs:

(i) a declaration that the plaintiff's dismissal was wrongful, and without just cause or excuse;

(ii) general and special damages for wrongful dismissal and/or reinstatement with all fringe benefits.

On 24 February 1994, this new application by the plaintiff's counsel as contained in encl 17, was heard by this court. However, in view of Tuan Hj Sulaiman's objection to the plaintiff's application to amend the pleadings, Encik Mohan Ghandi again applied to withdraw the application with liberty to file afresh. This application was allowed by the court.

Fourth amendment (encl 23)

Finally, on 27 May 1994, the plaintiff's fresh application to amend the writ and the statement of claim was heard by this court. In the statement of claim, the plaintiff amended the particulars to indicate wrongful dismissal.

The proposed amendments to the writ of summons and statement of claim sought, inter alia, the following reliefs:

(i) a declaration that the plaintiff's dismissal was wrongful, and without just cause or excuse;

(ii) general and special damages for wrongful dismissal and/or reinstatement will all fringe benefits.

A In the proposed amendment to the statement of claim, further facts were sought to be added to establish wrongful dismissal. Paragraph 12 of the proposed amendment to the statement of claim reads as follows:

> By reasons of the matters stated above the plaintiff contends that he was dismissed *wrongfully and* without just cause or excuse *in breach of the rules of*
B *natural justice. Further, the plaintiff will contend at the trial that the said dismissal was unreasonable.* [The proposed amendments are emphasized.]

It was contended by the plaintiff's counsel that these amendments were necessary to ensure that all matters in dispute may be effectively and completely determined and adjudicated on by the court (para 7 of encl 22,
C affidavit in support of the application for amendment).

Tuan Hj Sulaiman, who appeared for the defendant, objected to these proposed amendments, on the ground that the statement of claim, even with the proposed amendments, disclosed no cause of action, and further that the new cause of action for reinstatement which was now being sought by the plaintiff was statute-barred. The objection by the
D defendant on the ground that the pleadings disclosed no cause of action, however, was not strenuously pursued by the defendant, the main objection relied upon by the defendant being the limitation period.

On 27 May 1994, after hearing arguments, I allowed the plaintiff's application to amend the pleadings as contained in encl 23. I also ordered
E that the defendant be given sufficient time to file the re-amended defence.

I now give my reasons for allowing the plaintiff's application to amend the pleadings.

ISSUES

F The only issue in this case is whether this court ought to allow the fourth application (encl 23) of the plaintiff to amend the writ and the statement of claim.

DEFENDANT'S OBJECTIONS

G The defendant's primary objection to the amendment, as stated earlier, is that by so applying for the amendment, the plaintiff is raising a new cause of action which is statute-barred. It is argued on behalf of the defendant that by virtue of the Public Authorities Protection Act 1948, the limitation period is three years, and that by the plaintiff seeking to amend the
H pleadings, a new cause of action which was statute-barred was being introduced.

In determining whether there is merit in the defendant's objection, I need to consider two aspects of the law: (i) the principles governing the amendment of pleadings generally; and (ii) the circumstances under which
I leave may be granted to add a new cause of action (if indeed the new claim for reinstatement amounts to a new cause of action), after the relevant limitation period.

(i) *Amendments to pleadings generally*

I need not spell out in detail the general principles of law relating to the amendment of pleadings. Order 20 r 5(1) of the Rules of the High Court 1980 ('the RHC') confers on the courts a wide discretion to allow amendments, be it by the plaintiff, or the defendant. The courts will allow an amendment, at any stage of the proceedings, if such amendment is necessary in order to do justice between the parties.

It is an established principle that the courts have a wide discretion as to whether to allow an amendment or not: see for example the decision of Mohamed Dzaiddin J (as he then was) in *Ismail bin Ibrahim v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348. Though this discretionary power of the courts is wide, this discretion is exercised in accordance with established principles. The principles governing amendments of pleadings generally are clearly spelt out in Jacob and Goldrein, *Pleadings, Principles and Practice* (1990) at p 189 as follows:

> The wide and extensive powers of amendment vested in the courts are designed to prevent the failure of justice due to procedural errors, mistakes and defects and they are exercised to further and serve the aims of justice. The powers of amendment are intended to make more effective the function of the courts to determine the true substantive merits of the case, to have more regard to substance than to form, and thus to free the parties and the court from the technicalities or formalities of procedure and to correct errors and defects in the proceedings.

In dealing with the discretionary nature of this power of the courts, the authors point out at p 194:

> The power is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. As a general rule, however late the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise. However, different considerations will apply to different stages of the proceedings or to the different nature of the amendments sought.

The authors also state that generally, in the exercise of their discretion, the courts in practice readily grant leave to amend before trial, so long as the application is made in good faith and within a reasonable time: see generally *The Supreme Court Practice 1995*, para 20/5–8/6, wherein the following comment is stated:

> It is a guiding principle of cardinal importance on the question of amendments that, generally speaking, all such amendments ought to be made for the purpose of determining the real question of controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. (Per Jenkins LJ in *GL Baker Ltd v Medway Building & Supplier Ltd* [1958] All ER 540 at p 546.)

So long as the injustice caused to the opponent can be compensated by costs, an amendment is generally allowed.

In *Mahan Singh v Government of Malaysia* [1973] 2 MLJ 149, Sharma J, in rejecting the defendant's argument that the amendment sought by the plaintiff during the course of the trial would be prejudicial to the defendant observed at p 150:

> The prejudice referred to in the decided cases is the prejudice whereby the position of a party may be so altered that it cannot be compensated by costs. Leave is given to amend the pleadings even at the hearing, ... In this case, however, although the plaintiff should have asked for an amendment of the statement of claim at a much earlier stage, I do not think the delay is fatal to the application provided the defendant can be compensated by costs. There can be no prejudice whatsoever to the defendant. ... There can possibly be no sudden surprise about it to the defendant. The nature of the suit still remains the same and it is not changed into a suit of another nature.

In the present case, I am of the view, based on general principles, and under O 20 r 5(1), the proposed amendments of the plaintiff, if it does not amount to a new cause of action which is statute-barred, as it causes no injustice to the defendant, and as the application appears to have been made in good faith, prima facie, leave ought to be granted to the plaintiff.

However, as the question of limitation has been raised, I need to go further to determine whether such an amendment may still be allowed, not under O 20 r 5(1), but under any other relevant rules.

(ii) *Amendments and limitations*

Of particular relevance to the issue before this court is whether the proposed amendment may be allowed even though it introduces a new cause of action after the expiry of the relevant limitation period.

Rule 5(5) of O 20 of the RHC specifically provides for such an eventuality. The said rule reads as follows:

> An amendment may be allowed under para (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

Rule 5(5) of Order 20, therefore only applies if the following conditions are present:

(a) a *new cause of action* is added or substituted;

(b) the new cause of action arises from the same facts or *substantially* the same facts as the cause of action in respect of which *relief* has already been claimed.

If the proposed amendments do not fulfil either of these two requirements, no amendments will be allowed under r 5(5).

It should further be noted that if no new cause of action is added or substituted, the discretion of the courts under rule 5(5) is not applicable. In such cases, the general principles of law relating to the amendment of

pleadings, as stated in the earlier part of this judgment, apply. McGee, in his book, *Limitation Periods* (1990) states this aspect of the law clearly as follows at p 347:

> ... a preliminary point here is that the discretion conferred by the rule [O 20 r 5(5)] is required only when the amendment seeks to add a new cause of action. There is a fine distinction between amendments which merely seek to clarify the existing issues between the parties, which do not fall within the scope of this rule, and amendments which seek to add a distinct cause of action. An amendment which merely adds a new particular to an existing cause of action will be allowed even though the time has expired.

The important point to note is that r 5(5) of O 20 limits the scope of the defendant's accrued right to plead limitation. Whilst the defendant may have acquired this right, he may be deprived of it, if the court exercises its discretion under r 5(5) to allow the plaintiff's application to add a new cause of action. The scope of this rule is stated in *The Supreme Court Practice 1995* as follows at para 20/5–8/7, p 372:

> The principle underlying the powers of the court under r 5 is that if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paras, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit of the defence, which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend in the cases specified in these paras, that the defendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the court will not use its powers to amend under O 20 r 8, and O 15 rr 6, 7 and 8 (see per Holroyd Pearce LJ in *Pontin v Wood* [1962] 1 All ER 294, 298).

This paragraph was referred to with approval in *Rodriguez v RJ Parker (Male)* [1967] 1 QB 116 at p 127, and in the Singapore Court of Appeal decision in *Lim Yong Swan v Lim Jee Tee* [1993] 1 SLR 500, referred to below.

Though r 5(5), makes serious inroads into the defendant's right conferred by the Limitation Act 1953, attempts, however, to challenge the validity of r 5(5), have all been unsuccessful: see *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 232 below; and para 20/5–8/7 at p 372 of *The Supreme Court Practice 1995*.

The courts, in considering whether an amendment ought to be allowed under this rule, take into consideration several factors, of which the following two are of particular importance:

(a) whether the new cause of action arises out of the same facts or substantially the same facts in respect of which relief has already been claimed by the party;

(b) whether the court considers it just to allow the amendment, that is, whether the amendment will cause any injustice to the other party.

See generally, McGee, *Limitation Periods* (1990) at pp 347–348 and Pinsler, *Civil Procedure* (1994) at pp 269–275, and especially the recent decisions of the Singapore Court of Appeal cited in the latter.

In dealing with the scope of r 5(5) of O 20, Abdul Hamid Ag LP, in the Supreme Court case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 232 observed at p 232:

> It is also clear from the established principle that the court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

His Lordship then continued at p 232:

> [Rule 5(5) of O 20] ... in my view, is clear in its terms. Effect should therefore be given to the rule which clearly enables the court to exercise its discretion in cases where it is satisfied that the new cause of action arises out of the same or substantially the same facts as the new cause of action in respect of which relief has already been claimed.

In the recent Singapore Court of Appeal decision in *Lim Yong Swan v Lim Jee Tee* [1993] 1 SLR 500, Yong Pung How CJ observed at p 508:

> A party seeking to amend under O 20 r 5(5) must therefore show:
>
> (1) that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and
>
> (2) if the court thinks it is just to grant leave to make the amendment.
>
> As to condition (1), ... the correct test [is] that set out in the case of *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* (1986) 33 BLR 77 and approved in *The Casper Trader*; whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim.
>
> The scope of condition (2) [is] rather more complicated. Clearly, the fact that the party opposing the amendment would be deprived of an accrued right of limitation would not of itself make it unjust to give leave to amend. It is one of the factors that can be taken into account ... .

See the following Malaysian and Singapore cases where leave was not granted as it was held that the new cause of action did not arise from the same facts or substantially the same facts: *Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 (decision of Edgar Joseph Jr J); *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793 (decision of Selvam JC affirmed by the Singapore Court of Appeal [1993] 2 SLR 113); *The Virginia Rhea* [1983] 1 MLJ 198 (decision of Rajah J, affirmed by the Singapore Court of Appeal [1985] 2 MLJ 1); *Chan Mui Eng & Ors v Chua Chu Huwe & Anor* [1994] 1 SLR 375 (decision of LP Thean JA).

INJUSTICE TO THE PARTIES

One cardinal principle which the courts bear in mind in considering whether an amendment ought to be allowed is whether by so allowing the amendment, injustice would be caused to the other party.

In the Federal Court decision in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, Mohamed Azmi FJ considered in detail the factors which should be taken into account when determining whether any proposed amendment would cause injustice to the parties. His Lordship observed at pp 214–215:

> ... the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result:
>
> (a) whether the application was bona fide;
>
> (b) whether the prejudice caused to the other side can be compensated by costs; and
>
> (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character

His Lordship then added at p 215:

> ... If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

It should, however, be stressed that the proper test which the courts apply, is not whether in allowing the amendment, it would cause injustice to the other party, but whether in the circumstances of the case, it is just to grant leave. In considering whether it is just to grant leave, the courts must necessarily consider the interests of both parties: whether injustice would be caused to the applicant if leave is not allowed, and whether injustice would be caused to the defendant if leave is granted. Therefore, in exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment.

Leave is generally granted if the applicant's original claim is bound to fail, thereby leaving the applicant with no redress. This is especially so, if the applicant is the plaintiff in the action. Again, to quote Jacob and Goldrein at p 202:

> ... the object of these powers [to allow amendments after the expiry of the limitation period] is to prevent certain defects in the writ or pleading from being fatal and to enable the court to cure the specified defects in an action ...

In *Lim Yong Swan* referred to above, Yong Pung How CJ said:

> As regards the applying party's need to amend, this is a question of examining whether refusing leave to amend would cause injustice to the applying

party. It does not, however, involve an examination of the merits of the applying party's case. Staughton LJ in *The Casper Trader* [1991] 2 Lloyd's Rep 237 put the matter this way at p 248:

> 'For my part I do not think it right, on such an application, to make an appreciation of the plaintiff's chances of success with or without the amendment, subject to four points:
>
> (1) If the plaintiffs' existing claim is bound to fail, that may possibly be relevant to what justice requires.
>
> (2) If it is bound to succeed, that could conceivably be relevant in deciding whether to allow a different cause of action leading to the same remedy but requiring much further investigation to be pleaded. However, it is difficult to imagine a defendant putting this forward as a reason why leave should be refused.
>
> (3) If the new claim is bound to fail, leave should be refused on ordinary principles.
>
> (4) If the new claim is bound to succeed, that may affect the justice of the case.
>
> It must be rare that any of these situations will arise. In other cases, provided that the new claim is fairly arguable, it does not seem to me that any investigation of the need to amend is appropriate.'

NEW CAUSE OF ACTION OR NEW RELIEF

Much of the difficulty which has arisen as to the exact scope of r 5(5) is due to the lack of a clear definition of the term 'cause of action'. It should be noted that r 5(5) provides for an addition or substitution of a new cause of action based on the same facts or substantially the same facts, 'as the cause of action in respect of which relief has already been claimed ...'. The rule therefore clearly draws a distinction between a 'cause of action', and a 'relief', the latter, of course meaning the remedy sought by the plaintiff in his action against the defendant.

A 'cause of action' has been defined as being:

> ... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved ...

per Lord Esher MR in *Coburn v Colledge* [1897] 1 QB 702 at p 707, CA, approved and applied in *Central Electricity Board v Halifax Corp* [1963] AC 785; [1962] 3 All ER 915, referred to in Jacob and Goldrein, *Pleadings Principles and Practice.*

The other more oft-quoted definition of a 'cause of action' is that of Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at p 242, where his Lordship said: 'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'

This definition of Diplock LJ was referred to by Abdul Hamid Ag LP in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 232, and more

recently by the English Court of Appeal in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10; and by the Singapore decision in *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793; affirmed by the Court of Appeal in [1993] 2 SLR 113.

The question as to whether the courts have the discretion to allow an amendment under O 20 r 5(5), where the amendment also seeks to add new *relief* or *remedy* was also considered by the then Supreme Court in *Hock Hua Bank Bhd v Leong Yew Chin* referred to earlier. The Supreme Court by a majority (Abdul Hamid Ag LP and Syed Ali Barakbah SCJ, with Seah SCJ dissenting) held that the fact that the plaintiff was seeking a new relief was no bar to the court's power to grant leave under the said rule. Abdul Hamid Ag LP observed at p 232:

> The rule is silent: indeed, it does not make the granting of leave to amend under r 5 conditional upon there being no new or substantially new *relief* arising out of the new cause of action. To construe otherwise would, in my view, be reading into r 5 something which is not provided for. I am firmly of the view that a *new relief* is not a relevant consideration.

In the Singapore decision in *Multi-Pak Singapore Pte Ltd v Intraco Ltd*, Selvam JC pointed out at p 802:

> Order 20 r 5(5) therefore uses the term [cause of action] in the historical sense to refer to the relief or remedy which the plaintiff seeks. This construction is supported by the feature that the earlier part of the paragraph makes reference to the factual situation of the case.
>
> ... On the basis of the analysis therefore, if all the material facts have been pleaded to constitute a cause of action in the factual sense of the term, the plaintiff will be allowed under O 20 r 5(5) to amend his statement of claim to add a cause of action in the historical sense by pleading an additional or alternate relief or remedy.

In fact, in most cases where leave is sought under O 20 r 5(5), the plaintiff will invariably seek a new relief or remedy. For this purpose, he would seek to amend the pleadings, not only to add new allegations of facts, but also to obtain a new relief.

PRESENT CASE

I now proceed to consider whether in the instant case, leave ought to be granted to the plaintiff to amend the pleadings. To successfully oppose the application, the defendant must establish the following:

(a) that a new cause of action is added or substituted; and

(b) that the new cause of action does not arise from the same facts or *substantially* the same facts as the cause of action in respect of which *relief* has already been claimed; and

(c) that the proposed amendment will cause injustice to the defendant.

Same facts or substantially the same facts

The determination of this issue is essentially a question of fact. Whilst earlier decisions may provide some useful guidelines, each case has to be considered on its own facts. As was pointed out by the English Court of Appeal in the recent case of *Welsh Development Agency* [1994] 4 All ER 10 per Glidewell LJ at p 29, referred to above 'whether or not the new cause of action arises out of substantially the same facts as that already pleaded is substantially a matter of impression'.

In the instant case, the basic facts relied upon by the plaintiff in the original pleadings and in the proposed amendments are as follows: (a) the plaintiff was in the employment of the defendant; (b) the plaintiff was dismissed by the defendant; (c) before the dismissal, a domestic enquiry was conducted by the defendant; (d) the plaintiff appealed against the decision of the defendant to dismiss him; and (e) the defendant dismissed the plaintiff's appeal.

However, in the proposed amendments, the plaintiff seeks to add the following facts: (a) details of the original charge which was brought against the plaintiff by the defendant; (b) the withdrawal of the original charge and the new charge which was subsequently framed by the defendant against the plaintiff; (c) particulars of the appeal which the plaintiff lodged against the dismissal; and (d) the reasons as to why the plaintiff alleges that his dismissal and the rejection of his appeal by the defendant was wrongful, without just cause or excuse, or unreasonable, and in breach of natural justice.

The addition of these new facts and allegations was deemed necessary by the plaintiff to establish wrongful dismissal on the part of the defendant, and to seek a declaration that his dismissal was wrongful and that he ought to be reinstated.

I am of the view that even if the plaintiff is introducing a new cause of action, these new facts are substantially the same facts as that originally pleaded by the plaintiff. The basic fact is the same: to challenge the decision of the defendant in dismissing the plaintiff. The plaintiff has, throughout maintained this stand. In all successive amendments, the plaintiff continues to challenge his dismissal. This is not a case of the plaintiff, in his proposed amendments, seeking to bring an entirely different action against the defendant, or changing the character of the cause of action or relief.

It is the same story, like the plaintiff in the case of *Dorman v JW Ellis & Co Ltd* [1962] 1 All ER 303, sought to retell in his amendments. In allowing the plaintiff's application, Davies LJ in *Dorman's* case observed at p 307:

> ... The story that is now set up by the plaintiff is the same story that was set up all along ... what is now sought to be done is not to make out a new case of negligence but to persist in the old story and invite the judge at the trial

> to approach it, to interpret it, from a different angle or aspect. It is a different approach to the same main story of the accident.

Whether it is just to allow the amendments

Every amendment must necessarily cause some degree of prejudice to the defendant. However, the important question is whether the prejudice amounts to such an injustice to the defendant that leave to amend ought to be refused. In the present case, the defendant was aware of the plaintiff's action right from the start. It cannot therefore be said that the defendant is taken by surprise. On the contrary, the defendant ought to have anticipated these amendments, as the defendant was aware of the plaintiff's earlier attempts to amend the remedies sought. In this regard, I follow the observations of Webster J in the *The Casper Trader* [1991] 2 Lloyd's Rep 237, where in considering what amounts to prejudice to the defendant, His Lordship observed at p 243:

> In my view for any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the claim originally made, altered their position so as to make it more difficult to defend the new claim now made or in the sense that it will be more difficult for them to defend that claim than it would have been had the claim been brought within the period of limitation.

As stated earlier, in considering whether any injustice would be caused, the position of the plaintiff has also to be considered. The plaintiff is seeking redress for what he believes to be an injustice caused to him by the dismissal. Throughout, he has maintained his stand to challenge the validity of the dismissal. Initially he sought a declaration, and subsequently reinstatement. But in both situations, he sought a remedy which he thought was appropriate to challenge his dismissal. The plaintiff's lack of understanding of the complexities of the law, particularly of the law relating to wrongful dismissal, and the technicalities involved in the law on the dismissal of public servants, and others like the plaintiff who have acquired a 'status supported by statute' are understandable: see generally *Fadzil bin Mohamed Noor v University Technology Malaysia* [1981] 2 MLJ 196; and *Pushpadevi Singam v University of Malaya* [1993] 2 AMR 3025; *Vine v National Dock Labour Board* [1956] 1 QB 658, cf; *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407.

Professor MP Jain, in his leading text on *Administrative Law of Malaysia and Singapore* (2nd Ed), after analysing the Malaysian decisions on the remedies of declarations and certiorari, summarizes the current position of the law in Malaysia as follows at p 511, '... the question of judicial remedies in Malaysia is involved in technicalities'.

As indicated by the cases referred to by the plaintiff's counsel, this area of the law, particularly that relating to the remedies available under public law, as opposed to private employment law, is not free from uncertainties.

In the present case, some of the reliefs sought by the plaintiff may be misconceived. However, at this stage of the proceedings, especially so since the trial proper itself has not commenced, it is not the duty of this

court to determine the evidence nor the merits of the case. That, clearly, is the function of the trial judge. I merely have to consider whether according to the principles of law, the amendment ought to be allowed, and not whether the plaintiff has a good case, or that he is likely to succeed in his action. So long, as there is a possible cause of action under the relevant laws, and that the new remedy or cause of action is based on the same facts or substantially similar facts, I ought to allow the plaintiff's application to amend.

In this regard, I refer to the note in the *First Supplement to the 1995 Edition of The Supreme Court Practice* which reads as follows:

> There is power under Order 20 rule 5(5) to give leave to amend a statement of claim after the limitation period has expired in order to add or substitute a new cause of action arising out of the same facts as those already pleaded but which in fact disclosed no sustainable cause of action: *Sion v Hampstead Health Authority, The Times* 10 June 1994, Court of Appeal.

But see however, the views expressed by the Singapore Court of Appeal in *Jeyaretnam v Lee Kuan Yew* [1990] 2 MLJ 65 and *Lim Yong Swan* [1993] 1 SLR 500, above.

I must admit that the deprivation of any redress to the plaintiff if the amendments were not allowed has further convinced me in arriving at my decision. Furthermore, as I am also satisfied that greater injustice would be caused to the plaintiff, and not to the defendant, these amendments ought to be allowed.

After all, as Bower LJ said in *Cropper v Smith* (1884) 26 Ch D 700, at pp 710–711, referred to in *The Supreme Court Practice 1995*, para 20/5–8/6, at p 371:

> It is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of disciplining, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

In a similar vein, Sharma J, in *Mahan Singh v Government of Malaysia* [1973] 2 MLJ 149, a case dealing with the dismissal of a public servant, in allowing an application by the plaintiff to amend the statement of claim, during the course of the trial observed:

> The argument that the plaintiff may be in a position to succeed if the new amendment is allowed is frail and feeble. The courts exist for the administration of justice and to redress wrongs and do not become mere instruments of procedure at the instance of one party to obstruct the path leading to justice or means to redress of a wrong. The procedure of the

court, in fact, is designed to facilitate justice and to keep the machinery thereof in smooth running.

His Lordship then added:

> If the amendment is permissible and the law allows the amendment at this stage, it is irrelevant that the Government [the defendant] may not be able to find a defence to the new pleading. All I have got to consider is whether this plea should be allowed to be taken at this stage or not. I do not think that the proposed amendment is dishonest.

Though Bower LJ in *Cropper*'s case and Sharma J in *Mahan Singh*'s case were not specifically dealing with amendments which introduced a new cause of action, I am of the view that the sentiments expressed by the judges in both the cases are equally applicable to the present case. The paramount consideration is justice — justice to both the parties — and in this particular case, the justice of the case is in favour of the plaintiff.

CONCLUSION

In conclusion, in exercise of my discretion, and considering the relevant provisions of the law, I hereby grant leave to the plaintiff to amend this pleadings as contained in encl 23. I also order that the defendant be given leave to file his amended defence, if necessary, within a period of three weeks.

Application allowed.

Reported by Kevin Ooi